

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0218 WTH
RESPONSIBLE OFFICER LIABILITY
WITHHOLDING TAX
FOR TAX PERIOD: 1987 THROUGH 1988

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ISSUE

I. Responsible Officer Liability – Withholding Taxes

Authority: IC 6-2.5-9-3; IC 6-3-4-8; IC 6-8.1-5-1

Taxpayer protests the imposition of responsible officer liabilities on withholding taxes owed to the Department for tax periods in 1987 and 1988.

STATEMENT OF FACTS

Taxpayer was assessed as a responsible officer for withholding tax liabilities not paid by Company H during tax years 1987 and 1988. Taxpayer protested these responsible officer assessments. Additional facts will be provided below, as necessary.

I. Responsible Officer Liability C Withholding Tax

DISCUSSION

Indiana Code section 6-3-4-8 states in part:

04980218

PAGE 2

(a) Except as provided in subsection (d), every employer making payments of wages subject to tax under IC 6-3, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department... Such employer making payments of any wages:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from his wages and paid over in compliance or intended compliance with this section; and

(2) shall make return of and payment to the department monthly of the amount of tax which under IC 6-3 and IC 6-3.5 he is required to withhold.

(b) An employer shall pay taxes withheld under subsection (a) during a particular month to the department no later than thirty (30) days after the end of that month...

Indiana Code section 6-2.5-9-3 states,

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

Taxpayer was the sole shareholder and president of Company H. The Department based the assessments for periods in 1987 on late returns submitted by the company. The periods in 1988 were best information available assessments. Company H was assessed initially. Once a final distribution was made on Company H's bankruptcy action the Department assessed the taxpayer as an individual responsible officer.

Pursuant to Indiana Code section 6-8.1-5-1(b), AThe notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made...@

Taxpayer first claims withholding taxes were remitted to the Department for most of the assessment periods. Second, taxpayer claims to have been removed as the responsible officer through bankruptcy proceedings and other legal action taken by creditors for several periods of the assessments.

To support her first claim, taxpayer offered canceled checks payable to the Department for three periods of the assessment. Taxpayer also provided copies of the company's annual withholding reconciliation (WH-3) forms for both tax years.

To support her second claim, taxpayer submitted records from several legal proceedings. The company went into receivership (held by a mortgage lender) on February 12, 1988. Control of the company was given back to the taxpayer on March 17, 1988. The company had filed a Chapter 11 bankruptcy on March 10, 1988.

Taxpayer argues she was not in control of the company's finances when the withholding tax return was due for the January 1988 tax period. Taxpayer also argues she was not in a position of authority during the February 1988 period and, again, was not the responsible officer for withholding taxes due for that period. Taxpayer finally argues she had no responsibility after September 16, 1988. On that date, the bankruptcy court gave control of the company to the trustee and taxpayer had no further financial authority.

Pursuant to the Department's records and those provided by the taxpayer no liabilities remain for tax year 1987. The periods assessed in 1988 will be addressed individually.

Taxpayer was in control of the company during the January 1988 period but relinquished control to the receivership prior to the return being filed. Taxpayer was not in control during the February period but regained control prior to the return being due. The Department finds the taxpayer responsible for both tax periods. Upon regaining control of the company in March 1988, taxpayer had access to the business records. Taxpayer should have known of the failure to file the January return and done so at that time (and filed a late return plus penalty and interest). When taxpayer resumed control she could have timely filed the February 1988 return.

The trustee took control September 16, 1988. Assessments have been made for the periods of July 1988 through the end of the year. Taxpayer is responsible for only the July period. Taxpayer was removed prior to the August return deadline. As such, the trustee should have been responsible for the filing of the August return as well as those which followed.

The initial assessments for the 1988 tax year were based on the best information available to the Department because no returns were filed for those periods. The Department has recalculated the liability amounts pursuant to the amounts collected and the amounts reported on the taxpayer's annual reconciliation reports (WH-3 forms). The Department finds the more appropriate amount due for each assessment period to be \$655.16 plus interest.

Pursuant to IC 6-8.1-10-2.1, taxpayer has made an affirmative showing of reasonable cause for her failure to pay the withholding tax liabilities. All penalties shall be waived.

04980218

PAGE 4

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer is liable for withholding taxes plus interest due for the January, February and July 1988 tax periods. All penalties are waived.

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